U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an information technology company. It seeks to permanently employ the beneficiary in the United States as a Computer Software Engineer, Applications, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The Form I-140, Immigrant Petition for Alien Worker, was filed by on July 10, 2012. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which had been filed by with the U.S. Department of Labor (DOL) on October 31, 2011, and approved on January 31, 2012.

On July 12, 2010, the Director issued a Request for Evidence (RFE). The Director noted that the company that filed the petition is not the same as the company that filed the labor certification application, and requested documentary evidence that is the successor-in-interest to The Director also requested documentation of the petitioner's continuing ability to pay the proffered wage from the priority date onward.[2]

Counsel responded with a brief and additional documentation, including (1) an "Agreement for Purchase and Transfer of Business" between and dated October 1, 2011, (2) certificates from the Secretary of State of Washington confirming the existence and authorization of and listing its antecedent companies, and (3) federal income tax return, Form 1120, for 2011 (supplementing the petitioner's previously submitted Form 1120 for the same year).

On October 15, 2012, the Director denied the petition on the ground that the documentation of record did not show that the petitioner, is the successor-in-interest to the

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[1] This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

[2] The priority date of a petition is the date the underlying labor certification application was received for processing at the DOL. In this case the priority date is October 31, 2011.

original employer that filed the labor certification application. Thus, the petition lacked an appropriate labor certification.

The petitioner filed a timely appeal, Form I-290B, along with a brief from counsel, a Memorandum from U.S. Citizenship and Immigration Services (USCIS) on successor-in-interest determinations in the adjudication of Form I-140 petitions, and copies of previously submitted materials. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

USCIS has issued no regulations governing immigrant visa petitions filed by successor-in-interest employers. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. The case involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue reads as follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

Matter of Dial Auto does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[3] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[4]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[5] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a

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[3] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[4] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[5] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

With respect to the instant case, the labor certification was filed by of Bellevue, Washington. 2011 federal income tax return states that it had a federal employer identification number (FEIN) of and was a wholly owned subsidiary of which is incorporated in the British Virgin Islands.

According to a certificate issued by the State of Washington's Secretary of State on June 21, 2011, came into being on August 30, 2007 as a name change from which itself had come into being on August 4, 2003, as a name change from the original company whose certificate of formation was dated August 8, 2001. The certificate states that name was changed on June 10, 2011 to whose name was changed in turn to on June 13, 2011. Thus, the certificate lists a series of five names from to with the third in line. A subsequent Certificate of Existence/Authorization from the Washington Secretary of State, dated July 15, 2011, identifies as an LLC whose Certificate of Formation was issued in Washington on August 8, 2001.

Despite the fact that the certificate lists and as different names for the same company, the companies have different FEINs. Whereas is FEIN is , as shown on federal income tax return for 2011 – specifically, Form 8594, on which the $6 million asset acquisition from on October 1, 2011 was reported. There is no explanation in the record of proceeding how and can be the same company if they have different FEINs.

Counsel claims, and the aforementioned "Agreement for Purchase and Transfer of Business" (Agreement) confirms, that sold certain assets to on October 1, 2011 – specifically "all of its signed and ongoing Microsoft outsourcing business projects . . . and all related assets" – and agreed to "employ the Project Team." The Project Team allegedly included the beneficiary (who had been hired by on an H-1B visa in September 2010). However, the evidence in the record does not establish that is the same company as the entity that filed the labor certification.

In addition, despite the fact that appears to have purchased the business assets involved in this petition from on October 1, 2011, the labor certification was filed almost one month later – on October 31, 2011 – in the name of . Therefore, the ETA Form 9089 was filed in the former name of an entity that did not intend to employ the beneficiary at the time it was filed.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In visa petition proceedings, the petitioner bears the burden of proving eligibility in all respects. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

In July 2012 the Form I-140 petition was filed by While counsel contends that is the successor-in-interest to the evidence in the record does not establish this claim. According to the certificate issued by the Washington Secretary of State, certificate of formation was amended on June 10, 2011 to change its name to Panache Global , and just three days later it was amended again to change the corporate name to As previously noted, however, and have different FEINs – a fact not addressed or explained on the certificate from the Washington Secretary of State. The different FEINs indicate that the companies are separate legal entities, not the same company with a mere change of name. Since it has not been established that is the same entity (or a successor-in-interest to) the Agreement between and does not establish a successor-in-interest relationship between and for the purposes of the instant petition.

As the evidence of record fails to establish that is the successor-in-interest to , the labor certification application filed by is not valid for the immigrant visa petition filed by *See* 8 C.F.R. §§ 204.5(a)(2) and 20 C.F.R. § 656.30(c)(2). Accordingly, the petition cannot be approved. The Director's decision will be affirmed, and the appeal dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.